

No. 65111-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE,  
a sole corporation,

Appellant,

v.

A.G., D.F., J.J., J.B., M.B., and D.L.,

Respondents.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Respondents respectfully request the Court affirm the trial court's order because (1) the evidence the Archdiocese wants to destroy reflects its long history of enabling priests and others to sexually abuse children, (2) the trial court oversaw a monumental effort by the Archdiocese to conceal this evidence, and (3) the trial court denied the Archdiocese's motion to destroy the evidence after it learned that the Archdiocese was refusing to produce the evidence in other litigation with identical issues.

The trial court committed no error when it denied the Archdiocese's motion to have this evidence destroyed. This is particularly true where (a) the Archdiocese concedes it is the defendant in numerous cases with identical allegations; (b) the Archdiocese concedes it has not responded to discovery requests in those cases that ask for the same evidence; and, (c) perhaps most importantly, the trial court's order maintained all confidentiality terms of the original protective order.

That last point is worth repeating because the Archdiocese suggests that Respondents have engaged in "discovery by ambush," that Respondents seek "to strip the documents of crucial negotiated protections," and that the trial court blindly "set aside some of the most crucial protective terms of the order." Nothing could be further from the truth: every protective term of the original order remains in place.

While the Archdiocese may subjectively believe it is “crucial” that damaging evidence be destroyed, particularly where it refuses to produce the same evidence in pending cases with identical discovery requests, nowhere does it provide a legal justification for its position. This is especially true where the Archdiocese did not voluntarily produce this evidence pursuant to a stipulated protective order, but was ordered to produce it by the trial court. The fact that the parties stipulated to a protective order does not strip the trial court of its authority to modify the same, especially where the parties agreed that either a party or the trial court could modify it. The trial court was not required to sit idly by while the Archdiocese destroys damaging evidence with one hand and conceals it with another.

If the Archdiocese is genuinely concerned about the ability of parties to rely on a protective order, then it should voluntarily dismiss its appeal because it is trying to use the protective order as a sword, not as a shield. If anything, parties will avoid protective orders where there is a chance of subsequent litigation for fear that a party’s Herculean efforts to obtain evidence in one case will be meaningless in subsequent litigation. Why agree to a protective order in one case if the order cannot be modified to allow the use of the same evidence in identical cases, particularly where the parties agree to modifications?

## **II. ASSIGNMENT OF ERROR**

The trial court properly exercised its discretion in denying the Archdiocese's motion to destroy the evidence at issue because (1) the order does not govern the use of documents in other cases before different judges, but explicitly defers to those judges; (2) the order does not strike any of the protective terms of the original protective order, including the confidentiality requirements, but only modifies the requirement that the evidence be destroyed; (3) the order does not harm the credibility and integrity of the judicial process where the trial court repeatedly compelled the Archdiocese to produce the evidence, rather than the Archdiocese voluntarily producing the evidence pursuant to a stipulated protective order; and, (4) fundamental principles of justice and fairness support the order where the Archdiocese concedes it currently faces a number of similar or identical lawsuits, the Archdiocese concedes that it has refused to produce in those lawsuits the evidence it wants destroyed, and the Archdiocese concedes that it took roughly six months for Respondents to obtain this evidence after a half-dozen motions with the trial court and a motion for discretionary review with this Court.

### III. STATEMENT OF THE CASE

Each of the Respondents (hereinafter “boys”) was sexually abused by Edward Courtney while Courtney was a teacher and administrator at O’Dea High School, or while Courtney was a teacher and coach at schools in Othello, Washington.<sup>1</sup>

The boys in the “*J.B.* litigation,” J.B., M.B., and D.L., were abused at O’Dea High School in Seattle, Washington. They alleged that (1) they were sexually abused at O’Dea High School by Edward Courtney between 1974 and 1978, and (2) the Appellant (hereinafter “Seattle Archdiocese” or “Archdiocese”) failed to take reasonable steps to protect them from that abuse based on (a) the Archdiocese’s knowledge of Courtney’s past abuse of other children, and (b) the Archdiocese’s long history of dealing with sexual abuse of children by its employees and others.<sup>2</sup>

The boys in the “*A.G.* litigation,” A.G., D.F., and J.J., were abused at schools in Othello, Washington. They alleged that (1) they were sexually abused at schools in Othello by Edward Courtney after the Archdiocese removed him for molesting children at O’Dea High School and St. Alphonsus Parish School, (2) the Archdiocese failed to take reasonable steps to protect them from that abuse based on (a) the Archdiocese’s knowledge of Courtney’s past abuse of other children, and

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<sup>1</sup> A.G. CP 3-38; J.B. CP 1-27.

<sup>2</sup> J.B. CP 1-27.

(b) the Archdiocese's long history of dealing with sexual abuse of children by its employees and others.<sup>3</sup>

At the time the issue giving rise to this appeal arose, the boys' counsel represented five other plaintiffs (the "K.A. litigation") who alleged (1) they were sexually abused at O'Dea High School or St. Alphonsus Parish School by Edward Courtney between 1974 and 1980, and (2) the Archdiocese failed to take reasonable steps to protect them from that abuse based on (a) their knowledge of Courtney's past abuse of other children, and (b) the Archdiocese's long history of dealing with sexual abuse of children by its employees and others.<sup>4</sup>

In the *J.B.* and the *A.G.* litigation, the boys served the Archdiocese with discovery requests that asked it to produce evidence regarding its long history of handling employees and others who were accused of sexually abusing children.<sup>5</sup> It took the boys roughly a half-dozen motions and six months to finally obtain that evidence.<sup>6</sup>

In the *K.A.* litigation, the Archdiocese was served with identical discovery requests that ask it to produce evidence regarding its long history of handling employees and others who were accused of sexually

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<sup>3</sup> A.G. CP 3-38.

<sup>4</sup> A.G. CP 169, 208-255; J.B. CP 677.

<sup>5</sup> A.G. CP 169, 257-322 (*see* Interrogatory Nos. 1-2 and Request for Production Nos. 1-5); J.B. CP 677.

<sup>6</sup> A.G. CP 169, 177 at ¶¶ 4-6; J.B. C.P. 677

abusing children.<sup>7</sup> Unfortunately, just like it did in the *J.B.* and *A.G.* litigation, the Archdiocese provided no substantive response to those requests, only paragraphs of objections, and at the end of each “response,” the Archdiocese stated that it “will move for a protective order.”<sup>8</sup>

Moreover, just like it did in *J.B.* and *A.G.* litigation, the Archdiocese has taken the position in the *K.A.* litigation that it will not admit notice and foreseeability, and it will not drop its claims that other parties or nonparties are at-fault for the injuries suffered by those plaintiffs.<sup>9</sup>

Despite the fact that the *J.B.* and *A.G.* litigation and the *K.A.* litigation involve nearly identical allegations, defenses, discovery requests, and discovery responses, the Archdiocese asked the trial court to order the boys’ counsel to destroy the evidence that it produced in the *J.B.* and *A.G.* litigation regarding the Archdiocese’s long history of handling employees and others who were accused of sexually abusing children.<sup>10</sup> The trial court rejected the Archdiocese’s motion.<sup>11</sup>

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<sup>7</sup> A.G. CP 169-70, 324-360 (*see* Interrogatory Nos. 1-3 and Request for Production Nos. 1-5); J.B. CP 677-78.

<sup>8</sup> A.G. CP 169-70, 324-360 (*see* responses to Interrogatory Nos. 1-3 and Request for Production Nos. 1-5); J.B. CP 677-78.

<sup>9</sup> A.G. CP 112, 170 (acknowledging that the Archdiocese refuses to admit notice, foreseeability and joint and several liability); J.B. CP 620, 678 (same).

<sup>10</sup> A.G. CP 110-20; J.B. CP 618-28.

<sup>11</sup> A.G. CP 390-91; J.B. CP 689-90.

The trial court's order was based on (1) the nearly identical allegations, defenses, discovery requests, and discovery responses between the *J.B.* and *A.G.* litigation and the *K.A.* litigation, (2) the nearly six month delay and substantial amount of motion practice that it took to obtain this evidence, both with the trial court and with this Court, (3) the substantial amount of time and effort that the boys' counsel has spent reviewing and summarizing the six banker's boxes of information that the Archdiocese eventually produced regarding its long history of handling sexual abuse of children, (4) the fact that the boys' counsel represented six other men who were sexually abused as boys at schools run by the Archdiocese (in addition to the five in the *K.A.* litigation), (5) it would be a massive waste of resources, for both the parties and the courts, if the boys' counsel was forced to destroy this evidence and re-litigate these issues, and (6) the Archdiocese is collaterally estopped from trying to re-litigate the same issues in the *K.A.* litigation that were litigated for many months in the *J.B.* and *A.G.* litigation.<sup>12</sup>

Although the trial court rejected the Archdiocese's motion, the court (1) allowed the protective terms of the order to stay in place, and (2)

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<sup>12</sup> A.G. CP 390 (denying the Archdiocese's motion "for the reasons stated in plaintiff's response"); J.B. CP 689 (same); *cf.* A.G. CP 167-75 (articulating reasons why the Archdiocese's motion should be denied) and J.B. CP 675-83 (same).

ruled that the parties could seek to modify the terms of the protective order “before the judge assigned to the particular case.”<sup>13</sup>

The trial court’s decision to modify the protective order is in accord with the parties’ stipulation that allowed either a party or the court to modify it:

Nothing in this Stipulation shall prevent a party from requesting further relief from the Court regarding the information covered by this Stipulation and nothing in this Stipulation shall prevent the Court from modifying the Stipulation or resulting Order as the Court deems necessary to comply with the law.<sup>14</sup>

Finally, it is worth noting that the trial court was well-situated to address these issues because it (1) entered a detailed order that explained why this evidence had to be produced,<sup>15</sup> (2) imposed detailed protective terms in order to address the Archdiocese’s objections to producing it,<sup>16</sup> and (3) issued more than a half-dozen orders, over a six-month period, compelling its production when the Archdiocese and its co-defendants refused to do so.<sup>17</sup>

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<sup>13</sup> A.G. CP 390-91; J.B. CP 689-90.

<sup>14</sup> A.G. CP 78; J.B. CP 210

<sup>15</sup> A.G. CP 66-70; J.B. CP 63-67.

<sup>16</sup> A.G. CP 66-70; J.B. CP 63-67.

<sup>17</sup> *See generally* A.G. CP 71-73, 74-76, 85-86, and 87-90; J.B. CP 68, 69-70, 71-107, 108-10, CP 111-14, 206-08, 217-18, and 611-14.

For example, almost three months after it initially ordered the Archdiocese to produce this evidence, the trial court issued a four-page order that outlined the Archdiocese's monumental efforts to conceal this evidence:

On August 25, 2009, this court entered an extensive order directing the Archdiocese to produce discovery. The order followed extensive briefing by plaintiffs and the Archdiocese. The order was followed by additional motions, including motions filed in the Court of Appeals. In each instance, the Archdiocese resisted providing the court-ordered discovery. In each instance, the challenges were rejected.<sup>18</sup>

The trial court went on to detail the various ways the Archdiocese had resisted producing this evidence. It then ordered the Archdiocese to “immediately produce” the evidence “subject to the same protective terms set forth in the August 25, 2009 order.”<sup>19</sup> Nowhere does the August 25, 2009, order require that the evidence be destroyed.<sup>20</sup>

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<sup>18</sup> J.B. CP 111.

<sup>19</sup> J.B. CP 111-14.

<sup>20</sup> A.G. CP 66-70; J.B. CP 63-67.

#### IV. ARGUMENT

##### A. Standard of Review

The trial court's order must be upheld if its order reflects "sound judgment ... with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 1062 (1956).

The Archdiocese faces a high burden in asking the Court to overturn the trial court's discretion on a discovery issue: it must show the trial court's decision "rests on facts unsupported in the record or was reached by applying the wrong legal standard," or that "no reasonable person" would arrive at the same conclusion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotations and citations omitted).

**B. The Trial Court Made no Ruling that Allows Documents to be Used in Other Cases Before Other Judges; the Order Explicitly Rejects that Argument**

It is unclear why the Archdiocese leads its brief by suggesting the trial court ordered the evidence at issue could be used “in other cases pending before different judges.”<sup>21</sup> The court’s order explicitly rejects that argument.

The only issue before the trial court was whether the boys’ counsel was required to destroy evidence (1) the Archdiocese concedes is relevant to similar or identical cases where the plaintiffs are represented by the boys’ counsel, (2) the Archdiocese concedes it has refused to produce in response to identical discovery requests in those cases, and (3) the Archdiocese concedes it delayed producing for six months through “procedural maneuvers,”<sup>22</sup> despite multiple orders compelling its production.<sup>23</sup>

In support of its motion to destroy that evidence, the Archdiocese argued that the boys’ counsel should have to “start over” pursuant to the protective order,<sup>24</sup> even though it now concedes it had received “discovery

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<sup>21</sup> Archdiocese’s brief at 11.

<sup>22</sup> Archdiocese’s brief at 29.

<sup>23</sup> J.B. CP 111-14.

<sup>24</sup> A.G. CP 110-20; J.B. CP 618-28.

requests ... in the [*K.A.* litigation] asking for the very same documents” prior to signing the stipulation.<sup>25</sup>

The boys’ counsel, on the other hand, argued that such an approach made no rational sense because (1) they had spent considerable time and resources reviewing the evidence and summarizing it (six banker’s boxes of documents), (2) the Archdiocese had already received discovery requests that asked for the exact same evidence in similar and identical cases, (3) the procedural history was repeating itself, as the Archdiocese had already refused to produce the evidence in those cases, and (4) neither the court system nor the parties should have to endure another six months’ of “procedural maneuvers” to reach the same position.<sup>26</sup>

Although the trial court rejected the Archdiocese’s arguments, the scope and effect of its order was narrow. Rather than quash the protective order or eliminate any of its confidentiality provisions, the trial court simply denied the Archdiocese’s motion to destroy the evidence.<sup>27</sup>

For that reason, it is unclear why the Archdiocese argues the trial court “set[] aside some of the most crucial protective terms of the order”<sup>28</sup>

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<sup>25</sup> Archdiocese’s motion at 32-33.

<sup>26</sup> A.G. CP 167-75; J.B. CP 675-83.

<sup>27</sup> A.G. CP 390-91; J.B. CP 689-90.

<sup>28</sup> Archdiocese’s brief at 36.

when the order plainly states “the terms of the protective order at issue shall remain in place.”<sup>29</sup>

Similarly, it is unclear why the Archdiocese suggests the trial court “ordered that [the boys’ counsel] could use the documents ... in other cases in other cases pending before different judges” and it is unclear why it suggests the trial court engaged in “massive jurisdictional overreaching.”<sup>30</sup> Again, nothing could be further from the truth.

The trial court made no effort to impose its prior rulings on other courts, and it made no effort to dictate what rulings other courts should make in the future. Instead, the trial court (1) denied the Archdiocese’s motion to destroy damaging evidence, but (2) ordered that the “terms of the protective order at issue shall remain in place.”<sup>31</sup>

While the trial court explained that the protective terms “shall govern the use of these materials” in a handful of cases against the Archdiocese with identical issues, and where the plaintiffs are represented by the boys’ counsel, it specifically deferred to the judges in those cases: “Should the parties in the above cases seek to modify the terms of the

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<sup>29</sup> A.G. CP 390-91; J.B. CP 689-90.

<sup>30</sup> Archdiocese’s brief at 11, 14.

<sup>31</sup> A.G. CP 390-91; J.B. CP 689-90.

protective orders, they may do so before the judge assigned to the particular case.”<sup>32</sup>

The legal position the Archdiocese takes with this portion of the court’s order is ironic because this is the exact approach that the Ninth Circuit adopted in *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003), upon which the Archdiocese relies heavily in its briefing.

Indeed, this approach is even quoted with approval in the Archdiocese’s brief:

These procedures also preserve the proper role of each of the courts involved: the court responsible for the original protective order decides whether modifying the order will eliminate the potential for duplicative discovery. If the protective order is modified, the collateral courts may freely control the discovery process in the controversies before them without running up against the protective order of another court.”

*Id.* at 1133.

If anything, the trial court gave even more deference to the other courts than what was approved in *Foltz*: the trial court rejected the Archdiocese’s motion to have evidence destroyed and left it up to the other courts to fashion whatever protective order they deem appropriate.

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<sup>32</sup> A.G. CP 391; J.B. CP 690.

On that note, and with all due respect, it is disingenuous for the Archdiocese to suggest that the trial court was trying to impose rulings regarding the discoverability or admissibility of this evidence on other courts when it stated that the protective order “shall govern the use of these materials” in a few other cases.<sup>33</sup> The context in which that phrase was used shows that the trial court was doing nothing of the sort, but was simply reinforcing that the protective terms would remain in place, subject to rulings by the other courts: “It is further ORDERED that the terms of the protective order at issue shall remain in place and shall govern the use of these materials” in a few similar or identical cases against the Archdiocese where the boys’ counsel represents the plaintiffs.<sup>34</sup>

Nothing in that order, or the underlying protective order, has anything to do with the discoverability or admissibility of this evidence.<sup>35</sup>

It is also ironic that the Archdiocese quibbles with the trial court’s deference to the other trial courts: if the Archdiocese is genuinely concerned about confidentiality, why would it take issue with the trial court identifying this narrow set of cases where (a) the factual and legal issues are similar or identical, and (b) each of the plaintiffs is represented by the boys’ counsel? And more to the point, why would it take issue with

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<sup>33</sup> Archdiocese’s brief at 13.

<sup>34</sup> A.G. CP 390-91; J.B. CP 689-90.

<sup>35</sup> *See e.g.* A.G. CP 390-91; J.B. CP 689-90; *see also* A.G. CP 66-70; J.B. CP 63-67.

the trial court imposing the protective terms of the order, subject to the discretion of the judges in those cases?

Nowhere does the Archdiocese answer those questions, and the reason is fairly obvious: the Archdiocese is not concerned with confidentiality. Rather, the Archdiocese wants to re-bury damaging evidence with the hope that it can eventually destroy it, or that it can make the price for trying to obtain it in other cases so high that the boys' counsel runs out of time, runs out of resources, or runs out of patience in having to re-review and re-summarize six banker's boxes of documents. This is exactly the type of inefficient game-playing that the trial court rejected, both out of a concern for the court system and for the parties.

The Archdiocese's overreaching with its factual representations and legal arguments illustrates the fundamental problem with its entire appeal: the trial court ordered the Archdiocese to produce damaging evidence, denied the Archdiocese's motion to make the boys' counsel destroy that evidence, but ensured the protective terms of the order remained in place, subject to the discretion of other trial judges.

Neither the law nor the facts support a conclusion that the trial court abused its discretion in doing so. The trial court properly exercised its discretion and its order should be upheld.

**C. The Trial Court Made no Ruling that Prospectively Applies Collateral Estoppel to Bind Other Courts; the Terms of the Order Rejects that Argument**

Just like it made no effort to impose its discoverability or admissibility decisions on other courts, the trial court likewise made no effort to impose a collateral estoppel ruling on other courts.

More specifically, nowhere did the trial court rule that “the Archdiocese was collaterally stopped from challenging the discoverability of these documents in other cases.”<sup>36</sup> While the boys raised the collateral estoppel issue in their opposition to the Archdiocese’s motion to destroy this evidence, they did so to highlight the disingenuous nature of the Archdiocese’s argument that the protective order could not apply to it in the *K.A.* litigation.<sup>37</sup> Nowhere did the boys ask the Court to conclude that the Archdiocese is, in fact, collaterally estopped in that litigation.<sup>38</sup>

Moreover, and perhaps more importantly, while the trial court stated it was denying the Archdiocese’s motion to destroy the evidence “for the reasons stated in plaintiff’s response,” the trial court made very clear that “should the parties in the above cases seek to modify the terms of the protective orders, they may do so before the judge assigned to the

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<sup>36</sup> A.G. CP 390-91; J.B. CP 689-90.

<sup>37</sup> A.G. CP 172-73; J.B. CP 680-81.

<sup>38</sup> *Id.*

particular case.”<sup>39</sup> That statement, alone, negates the suggestion that the trial court was somehow ruling the Archdiocese is collaterally estopped from challenging the discoverability of these documents in other cases.

With all due respect, the Archdiocese’s argument on this point is another effort to cherry pick the court’s language in order to create an issue where one does not exist. The court simply made no effort to impose any discoverability or admissibility ruling on other courts, let alone a decision regarding collateral estoppel. To the contrary, as approved in *Foltz*, the trial court correctly modified its order so that the evidence was not destroyed, and it deferred to other courts to decide what evidence is discoverable, what evidence is admissible, and whether collateral estoppel should apply.

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<sup>39</sup> A.G. CP 391; J.B. CP 690.

**D. The Trial Court Properly Exercised Its Discretion in Modifying the Order to Secure the Just, Speedy, and Inexpensive Determination of Litigation, Particularly Where the Parties Agreed to Modifications and Public Policy Supports the Modification**

The trial court properly exercised its discretion in denying the Archdiocese's motion to destroy the evidence for a number of reasons.

**First**, the trial court's order was necessary to secure the just, speedy, and inexpensive determination of litigation. CR 1; *see also* Kohl v. Zemiller, 12 Wn. App. 370, 372, 529 P.2d 861 (1974) ("a practical solution should be preferred to a technical one whose use might result in frustrating the purpose of the superior court rules"); *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (a trial court has "broad discretion to manage the discovery process" so as to ensure full disclosure of information while protecting the litigants' interests).

The trial court was in a unique position to decide that this evidence should not be destroyed because it oversaw the monumental effort that the Archdiocese undertook to try to conceal it. This is well-reflected in the court's order dated November 17, 2009, where it described the wasteful and tortured "procedural maneuvers" that the Archdiocese used to avoid producing this evidence:

On August 25, 2009, this court entered an extensive order directing the Archdiocese to produce discovery. The order followed extensive briefing by plaintiffs and the Archdiocese. The order was followed by additional motions, including motions filed in the Court of Appeals. In each instance, the Archdiocese resisted providing the court-ordered discovery. In each instance, the challenges were rejected.<sup>40</sup>

Months later, when faced with evidence that the Archdiocese was trying to use the court's protective order to destroy this same evidence, while at the same time refusing to produce it in similar or identical cases, the trial court correctly ruled that the evidence should not be destroyed.<sup>41</sup>

In doing so, it rejected the Archdiocese's argument that its concerns about confidentiality outweighed the need to preserve the evidence. This is particularly true where the order did not affect "some of the most crucial protective terms of the [original protective] order," as suggested by the Archdiocese.<sup>42</sup> Rather, it denied the Archdiocese's motion to have the evidence destroyed and retained the confidentiality provisions of the original protective order.

Given the trial court's intimate knowledge of the facts and legal issues, its order should be upheld because it reflects "sound judgment ...

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<sup>40</sup> J.B. CP 111-14.

<sup>41</sup> A.G. CP 390 (denying the Archdiocese's motion "for the reasons stated in plaintiff's response"); J.B. CP 689 (same); *cf.* A.G. CP 167-75 (articulating reasons why the Archdiocese's motion should be denied) and J.B. CP 675-83 (same).

<sup>42</sup> Archdiocese's brief at 36.

with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.” *State ex rel. Clark*, 49 Wn.2d at 462.

**Second**, the trial court’s order should be upheld because the Archdiocese specifically agreed that it could be modified by either party or the trial court:

Nothing in this Stipulation shall prevent a party from requesting further relief from the Court regarding the information covered by this Stipulation and nothing in this Stipulation shall prevent the Court from modifying the Stipulation or resulting Order as the Court deems necessary to comply with the law.<sup>43</sup>

While the Archdiocese concedes in its motion that the boys’ counsel was a party to the stipulation,<sup>44</sup> it makes no effort to explain why the trial court erred in granting their motion to modify it. The stipulation allowed the order to be modified and the boys’ requested as much. The Archdiocese fails to show how the trial court erred when the stipulation specifically allowed for modification.

Moreover, and perhaps more importantly, the stipulation allowed the trial court to modify the order as it deemed necessary to comply with the law. As stated above, the trial court exercised its discretion and decided, under the law, that the evidence should be preserved.

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<sup>43</sup> A.G. CP 78; J.B. CP 210

<sup>44</sup> Archdiocese’s brief at 9 n.4.

Ironically, the Archdiocese argues modification in favor of the boys was not acceptable because they “could have incorporated different terms in the protective order or re-negotiated the terms of the protective order in the settlement agreement.”<sup>45</sup> That is backwards logic: if the Archdiocese wanted to ensure that the order was not subject to modification, then it should have incorporated different terms or re-negotiated those terms in the settlement agreement.

It failed to do so, and it cannot now suggest the trial court committed error, or the boys engaged in “discovery by ambush,” by having the order modified. The stipulation specifically allowed for it.

**Third**, the Archdiocese’s suggestion that the trial court could not deny its motion to have the evidence destroyed because the boys’ counsel was an original party to the stipulation is misplaced and makes no practical sense.

Most notably, this evidence was not voluntarily produced by the Archdiocese pursuant to a stipulated protective order, as it repeatedly suggests in its motion. Instead, the trial court ordered the Archdiocese to

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<sup>45</sup> Archdiocese’s motion at 36.

produce this evidence on August 25, 2009,<sup>46</sup> and issued numerous orders compelling its production when the Archdiocese refused to do so.<sup>47</sup>

Although the Archdiocese may not have produced the evidence until after the boys' counsel signed a stipulation, the Archdiocese cannot genuinely argue that it was reasonably relying on that stipulation or that it "refused to produce the documents at issue until the parties signed a non-sharing protective order."<sup>48</sup> While the record reflects that the Archdiocese feels it can do whatever it wants, whenever it wants, and on whatever terms it wants, the trial court ultimately decides when and under what circumstances evidence shall be produced, not the Archdiocese.

Moreover, the Archdiocese cannot argue that it was reasonably relying on the parties' stipulation in producing this evidence, or that is somehow prejudiced by the trial court denying its motion to destroy it, because the Archdiocese concedes in its motion that it had received "discovery requests ... in the [*K.A.* litigation] asking for the very same documents" prior to signing the stipulation.<sup>49</sup> If the Court takes that argument to its logical end-point, the Archdiocese is asking to be rewarded

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<sup>46</sup> A.G. CP 66-70; J.B. CP 63-67.

<sup>47</sup> J.B. CP 111-14.

<sup>48</sup> Archdiocese's motion at 20.

<sup>49</sup> Archdiocese's motion at 32-33.

for concealing evidence in the *K.A.* litigation, or for at least stalling the production of discoverable materials.

In this case, the trial court repeatedly compelled the Archdiocese to produce the evidence before the stipulation was entered, the trial court retained discretion to decide the circumstances of its production, and the Archdiocese signed a stipulation that memorialized that discretion, as well as an agreement that the boys could seek to modify it. Its arguments of reliance and prejudice are misplaced and do not support a finding that the trial court abused its discretion.

**Finally**, but related, the Court should reject the Archdiocese's policy arguments that upholding the trial court's decision will somehow increase litigation of discovery matters and undermine the purpose of protective orders. If anything, the opposite is true.

The trial court denied the Archdiocese's motion to destroy this evidence because of concerns of judicial economy, particularly given the trial court's personal experience with the Archdiocese's monumental effort to conceal it and its refusal to produce the same evidence in similar and identical cases.

That decision should decrease discovery litigation in those cases, not increase it. For example, the boys' counsel would not have agreed to the stipulation at issue if they knew the Archdiocese would produce highly

damaging evidence, try to use the stipulation to have the evidence destroyed, and then claim the stipulation could not be modified pursuant to its own terms.

Similarly, upholding the trial court's order will not undermine the purpose of protective orders because the protective terms of the order remained in place. If the Archdiocese is genuinely concerned about confidentiality, and not just trying to re-conceal damaging evidence, its concerns remain fully addressed.

On the other hand, reversing the trial court's order would cause the boys' counsel and other requesting parties to avoid protective orders for fear that any order will be used to hinder discovery in future cases. This is particularly true where the boys' counsel did not have access to the materials until after the protective order was put in place.<sup>50</sup> If the Court agrees with the Archdiocese, a requesting party will have little incentive to agree to a protective order because the party will not be able to modify it based on what is produced, especially in cases with recurring litigants, recurring attorneys, or recurring subject matter.

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<sup>50</sup> The Archdiocese cites no factual record to support its position that the boys "were given the opportunity to change the terms or future application of the non-sharing protective order in the settlement process but refused to do so." Archdiocese's motion at 22. The Court should therefore disregard that statement. Moreover, even if this statement was true, it is misplaced because it would have required the boys' counsel to possibly disrupt the boys' settlement in order to secure relief for plaintiffs in other matters. Such a requirement would run counter to Washington's public policy in favor of settlements, as well as an attorney's obligation to avoid conflicts of interest.

While the Archdiocese may be upset that this evidence is not destroyed, public policy cannot support a party's desire to destroy damaging evidence or a party's desire to make it slow and expensive for another party to obtain it. *Cf.* CR 1.

If the Archdiocese's arguments were correct, parties would likely engage in more litigation about discovery matters and protective orders, not less, because neither a trial court nor a party would ever have grounds to modify it and plaintiffs would understandably fear that any order will be used as a sword, not as a shield.

The trial court properly exercised its discretion in denying the Archdiocese's motion to have this evidence destroyed. Its decision reflects sound judgment based on what is right and equitable under the circumstances and the law, particularly given its intimate knowledge of the facts and law at issue. The Court should uphold that decision.

V. CONCLUSION

For the reasons and under the authorities presented above, the boys respectfully request that the Court deny the Archdiocese's appeal and affirm the decision of the trial court.

Dated this 7th day of July 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Bernadette Lovell, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertet  
Kosnoff PLLC, 701 Fifth Avenue, Suite 4730, Seattle, WA 98104,  
attorneys for plaintiffs/respondents.

C. On July 7, 2010, I caused a copy of Brief of Respondents to  
be served upon the following via

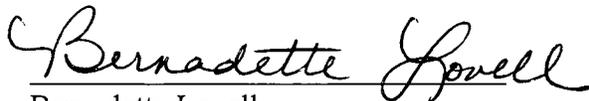
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4823-2305-5366, v. 3

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